IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12665 of 2000

And

SPECIAL CIVIL APPLICATIONS Nos 79,80 and 93 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA
and
Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT MAZDOOR PANCHAYAT

Versus

STATE OF GUJARAT

Appearance:
Mr.H.M.Mehta, senior counsel, with
MRS VASAVDATTA BHATT for Petitioner in Special Civil Application No.12665/2000.
Mr.A.K.Clerk for petitioners in Special Civil Application No.79/2001.
Mr.K.M.Patel for petitioner in Special Civil Application No.80/2001.

Mr. Shalin N. Mehta for petitioner in Special Civil Application No.93/2001.
Mr.S.N.Shelat, learned Advocate General, with Mr. Paresh Upadhyay for Respondent No.2 in all the Petitions.
Mr.A.D.Oza, learned G.P. for Respondent No.1 in all the Petitions.
Mr.A.M.Raval has appeared on behalf of Respondent No.3 - N.A.Acharya in all the Petitions.
Mr.Asim Pandya has entered appearance on behalf of G.P.S.C. in Special Civil Application No.79/2001

CORAM : MR.JUSTICE M.R.CALLA
and
MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE K.R.VYAS

Date of decision:04/05/2001

CAV COMMON JUDGEMENT

(Per : MR.JUSTICE M.R.CALLA)

1. Through these four Special Civil Applications different petitioners have challenged the appointment of the respondent Shri N.A. Acharya, Joint District Judge, Vadodara as the President of the Industrial Court, Gujarat made vide Notification dated 7.12.2000 issued by the order of Governor by the Labour and Employment Department of the Government of Gujarat under signatures of one Shri Mohan Chavda, Deputy Secretary to the Government in the Labour and Employment Department. Whereas all these four matters involve common question of law based on almost same set of facts, we propose to decide all these four Special Civil Applications by this common judgment and order as under:-

2. Special Civil Application No.12665/2000 was the first petition dated 9.12.2000 filed on 11.12.2000 by Gujarat Kishan Mazdoor Panchayat, a Registered Trade Union, before this Court with the prayer that the respondents be directed not to make any appointment on the post of President of the Industrial Court save and except by appointing any Member of the Industrial Court as President and to direct the respondent No.3 Shri Acharya to state the basis of his right to be appointed as President of the Industrial Court and to set aside and quash the appointment order dated 7.12.2000 purporting to

appoint him as the President of the Industrial Court. The matter came up before a single Bench of this court on 13.12.2000 and it appears that the petition was sought to be amended and such amendment was granted on 13.12.2000. On the said date i.e. 13.12.2000, the notice was issued by the single Bench to the respondents Nos.1 and 2 and the same was made returnable on 19.12.2000. On 21.12.2000 the time was sought on behalf of respondent No.2. i.e. High Court of Judicature for Gujarat for filing an affidavit in reply and the matter was made to stand over to 8.1.2001. The order sheet dated 22.12.2000 shows that the matter was taken up on that date i.e. 22.12.2000 on a mention being made by the learned counsel for the petitioner that the concerned Judge had come to Ahmedabad to take the charge as President of the Industrial Court. The main matter was, therefore, posted for admission on 26.12.2000 and the statement of Mr. Paresh Upadhyay, who appeared for respondent No.2. i.e. the High Court was recorded that even if the concerned Judge had taken over the charge,since the matter is kept on 26.12.2000, he will see to it that at least till that date the concerned Judge does not function as President of the Industrial Court since the matter is sub-judice and is kept on 26.12.2000 for admission. Thereupon the matter came up for admission on 26.12.2000 and on that date i.e. 26.12.2000 the matter was made to stand over to 2.1.2001 and the single Bench passed an order that in the meantime the concerned Judge Mr. N.A. Acharya may remain on leave and he may not function as President of the Industrial Court.

3. Against the above order dated 26.12.2000 passed by the learned single Judge (Coram: P.B.Majmudar,J), a Letters Patent Appeal No.918/2000 was preferred by the High Court before the Division Bench. On 27.12.2000 when this Letters Patent Appeal came up before the Division Bench (Coram: Ms.R.M.Doshit and A.L.Dave,JJ), the Division Bench was informed that the concerned Judge Mr. Acharya was on probation and cannot avail leave and further that the Industrial Court was observing vacation from 26.12.2000 till 2.1.2001 and, therefore, advocate for both the sides agreed that they would proceed further with the hearing of the matter on 2.1.2001 i.e. the date on which the matter was made to stand over and in this view of the matter, the Division Bench opined that the ends of justice shall be met if the direction issued against the learned Judge to remain on leave is set aside. The Letters Patent Appeal was accordingly allowed and the direction issued to the concerned Judge Mr. Acharya to remain on leave and not to function as President of the Industrial Court was set aside. On

2.1.2001 when the matter came up before the learned single Judge, an amendment was sought seeking a writ of quo-warranto also in this case and the Court opined that looking to the question involved and further that it was a petition in the nature of public interest litigation, the matter may be placed before the Division Bench on 8.1.2001 for admission, with the clarification that the question of interim relief may be decided on the aforesaid date i.e. 8.1.2001.

4. In the meanwhile Special Civil Application No.79/2001 dated 6.1.2001 was filed on 8.1.2001 by the Gujarat Industrial Court Judges Association and 12 others, who were working as Members, Industrial Court, Gujarat. This petition was circulated on 8.1.2001 itself but the same was made to stand over to 10.1.2001 and again to 15.1.2001. Yet another Special Civil Application No.80/2001 dated 6.1.2001 had been filed on 6.1.2001 by the Labour Laws Practitioners Association and this petition was also made to stand over to 10.1.2001 on 8.1.2001 and again to 15.1.2001. One more Special Civil Application No.93/2001 dated 8.1.2001 was filed on 8.1.2001 by the Surat Textile Labour Union and on 11.1.2001 it was also made to stand over to 15.1.2001.

5. All these four Special Civil Applications, as aforesaid, were taken up by the Division Bench on 16.1.2001 and on this date i.e. 16.1.2001 the Division Bench passed the order as under:-

"COMMON ORAL ORDER (Per : MR.JUSTICE B.C.PATEL)
#. Learned advocates and counsel appearing for the parties in the matter at the initial stage submitted to this Bench that they have no objection if these matters are heard by this Bench, particularly as one of us (B.C.Patel, J.) was a member of the Standing Committee which has taken the decision in these matters. As counsel appearing in the matters as well as the advocates requested the Court that the decision taken by the High Court in its administrative side should not come in way of hearing, the Court decided to proceed further with the matters. On behalf of the State as well as the Advocate General appearing for the High Court similarly stated before the Court.

#. These matters raise various questions i.e. whether the petitions filed by the associations or by the advocates or by the persons who were actually in services and were not selected are maintainable or not. The question with regard to eligibility was also raised. With regard to consultation of the Public Service

commission and that the order should be made by the Hon'ble the Governor was also raised before us. It was also submitted that the rules are merely draft rules which have not been finalised and no reliance should be placed on the draft rules. On the other side, a decision was pointed out indicating that reliance may be placed on the draft rules. It was submitted that if the person is competent, he should be permitted to discharge the duties and with a view to see that the decisions are rendered in the interest of public at large, the person should not be restrained from discharging his duties, more particularly when he is selected by a competent body. We are not elaborating the arguments made before us since we are of the view that the matters require consideration by a Larger Bench of this Court. Division Bench of this Court in the case of Prantiya Kamdar Sena & anr. v. State of Gujarat & anr, reported in 1998 (2) GLH 970 in para 11 has taken the view that in relation to service matters, the persons aggrieved must come forward. Others in the presence of such petitioners must not take up their cause and seek remedies. Mr. Mehta has taken us through the case of S.P. Gupta and others v. President of India & ors. reported in AIR 1982 SC 149 and subsequent decision of the Apex Court in the case of Sub-Committee on Judicial Accountability v. Union of India & ors., reported in (1991) 4 SCC 699 and submitted that the decision rendered by the Division Bench should not come in the way. In our view, it would be most appropriate to place these matters before the Larger Bench to consider the said decision.

#. We are of the view that the matters are required to be considered by the Larger Bench in view of the points and issues involved in these matters.

Draft amendment is granted in Spl.C.A. No. 79/2001.

#. The Registry is directed to place all these matters before the Hon'ble the Chief Justice. The present situation i.e. status quo shall continue till the matters are placed before the Larger Bench. It will be for the Larger Bench thereafter to pass appropriate orders as it may deem just and proper.

[B.C. PATEL, J.] [R.R.TRIPATHI, J.]"

6. Thereafter, on the basis of the order dated 24.1.2001 passed by the Hon'ble Chief Justice, the matters came up before this Bench on 16.2.2001 and again on 17.2.2001. The order passed on 17.2.2001 in these

cases would show that at the threshold of the commencement of the arguments it was made known to the learned counsel appearing in these cases that one of us (Hon'ble Y.B.Bhatt,J) was on the Standing Committee. All the learned counsel submitted that they have no objection if the matter is heard by this Bench including Hon'ble Y.B.Bhatt,J. On 17.2.2001 the rule was issued for the date of 16.3.2001 and the order of status quo, as had been passed by the Division Bench on 16.1.2001, was vacated and the matters were posted for final hearing on 16.3.2001. Since the exchange of pleadings was not complete on 16.3.2001, the matters were posted for 20.3.2001 on which date the arguments were heard and the judgment was kept CAV.

7. In Special Civil Application No.12665/2000 in the form of pleadings we have before us the petition dated 9.12.2000, the affidavit in reply dated 26.12.2000 filed on behalf of respondent No.2 under the signatures of one Shri V.R.Jadav working as Law Officer in the High Court of Gujarat, petitioner's affidavit dated 1.1.2001 in rejoinder to the reply affidavit filed on behalf of the High Court. In Special Civil Application No.79/2001 in the form of pleadings we have before us the petition and the affidavit-in-reply dated 10.1.2001 on behalf of respondent No.2 under the signatures of Shri V.R.Jadav working as Law Officer in the High Court of Gujarat. In Special Civil Application No.80/2001 in the form of pleadings we have before us the petition and in Special Civil Application No.93/2001 also we have before us the petition in the form of pleadings.

8. Briefly stated the petitioners have come with the case that at present one Shri Y.P.Bhatt, senior most Member of the Industrial Court is in charge President, Industrial Court and there were 13 other Members of the Industrial Court presently working as such. Further there are 39 Judges of the Labour Court who are working as such and out of the Labour Court Judges, two senior most Judges were eligible for appointment as Member, Industrial Court. Respondent - Shri N.A.Acharya had been appointed as Joint District Judge in November 1999 and was on probation at the time of selection as President, Industrial Court and he is quite junior in the seniority list of the cadre of District Judges. That certain petitioners as per para 14 of Special Civil Application No.79/2001 had put in more than 15 years service as Member, Industrial Court and prior thereto as Judge, Labour Court. The post of President, Industrial Court is the only promotional avenue and by appointing respondent Shri Acharaya, their promotional avenue has been snatched

away, while respondent - Shri Acharya was just appointed as Joint District Judge and is far junior to the Members of the Industrial Court, who are higher in seniority list in their own cadre. The appointment of respondent - Shri Acharya vide Notification dated 7.12.2000 has been challenged in these four petitions on more than one grounds as under:-

(i) The Industrial Court is a Court under Sec.3(16) of the Bombay Industrial Relations Act (hereinafter referred to as 'the Act') and it is a court of Industrial Arbitration constituted under Sec.10 of the Act. Under Sec.10(2) the Industrial Court shall consist of three or more members, one of whom shall be its President and under sub-section (4) of Sec.10 every member of the Industrial Court has to be a person, who is or has been a Judge of a High Court or is eligible for being appointed as a Judge of such Court or has presided over a Labour Court for not less than ten years. Whereas respondent - Shri Acharya is not a member of the Industrial Court, there was no question of his appointment as President of the Industrial Court because the President has to be out of the Members only. In want of his appointment as a Member of the Industrial Court, there is no question of his appointment as the President of the Industrial Court.

(ii) By Notification dated 12.2.1965 No.G.SH.122.ICE.1160/4863-T published in Gujarat Government Gazette Part IV-A dated 25.2.1965 the Government of Gujarat had framed Recruitment Rules for the post of Member, Industrial Court, Ahmedabad under the proviso to Article 309 of the Constitution. Neither respondent - Shri Acharya was eligible to be appointed as Member of the Industrial Court nor he was ever appointed as such.

(iii) That the appointment on the post of President, Industrial Court could not be made by direct recruitment and the Draft Rules, which have been relied upon by the High Court, are inconsistent to the provisions of the Act and such Draft Rules could not be acted upon and given effect to for the purpose of making selection and appointment of the President of the Industrial Court.

(iv) That the appointment of respondent - Shri Acharya as President, Industrial Court was in violation

of Articles 14 and 16 of the Constitution of India inasmuch as the other eligible candidates had not been considered and persons, who are already working as Members of the Industrial Court, have been excluded from consideration with reference to the Draft Rules by saying that they are not eligible to be considered for promotion because they have not completed 5 years of service as Member, Industrial Court and the other source of recruitment under Draft Rules i.e. by nomination was not available because of the provisions as contained in Sec.10 of the Act.

9. It has been pleaded on behalf of the High Court of Gujarat in its affidavit in reply dated 26.12.2000 that after the retirement of Shri D.V.Joshi as the President of the Industrial Court on 31.1.2000, the said post had remained vacant and there is no person who could be considered for promotion on the post of President of the Industrial Court, in the light of the eligibility criteria prescribed by the High Court on its administrative side. It had, therefore, become necessary to recommend the appointment of an appropriate person by nomination on the said post under Rule 2(b) as per the Draft Recruitment rules prepared by the High court. That the respondent No.3 Shri N.A.Acharya is more than 45 years of age and had practiced as an Advocate for not less than 10 years and thus he fulfilled the criteria mentioned in the Draft Rules prepared by the High Court, nay, Shri Acharya also fulfils the criteria prescribed by the Government as per the old Rules, according to which in case the post is not filled by appointment of a serving or retired Judge of High court, the appointment could be made either by nomination or by promotion from among the Members of the Industrial Court from amongst the candidates of not less than 45 years of age and from amongst those who have for at least 10 years either held judicial post in India or been an Advocate of High Court or have expert knowledge of industrial matters. It is stated in the affidavit in reply dated 10.1.2001 filed in Special Civil Application No.79/2001 by the High Court i.e. respondent No.2 that the Government of Gujarat in Labour and Employment Department had sent a communication dated 7.1.2000 to the High Court of Gujarat stating therein that due to retirement of Shri Joshi on 31.1.2000 the post of the President of the Industrial Court will fall vacant and the question of preparing the Recruitment Rules for the post of President, Industrial court is under consideration of the High Court and that till the Rules are not finalised, the Government cannot take a

decision in respect of appointment on the said post. Under these circumstances, it was decided to place the matter for consideration of the Standing Committee of the High Court of Gujarat as to by which mode the post of President, Industrial Court be filled up. It was decided by the Standing committee on 8.2.2000 that the post of President, Industrial Court, Ahmedabad be filled up by nomination under clause (b) of Rule 2 of the proposed Rules as none of the present Members of the Industrial Court was eligible to be appointed to the said post by promotion having not completed 5 years service on the post of Member, Industrial Court. It is then stated that the claim of all the incumbents holding the post of Member of Industrial Court was examined in the light of the criteria prescribed by the High Court of Gujarat for appointment on the post of the President of Industrial Court and it was decided by the Standing Committee to fill up the post of President of Industrial court by nomination. In the light of the decision of the Standing Committee it was further decided to ask for the willingness of the Judicial Officers working in the cadre of City Civil Court Judges and District Judges, who are not less than 45 years of age and had put in 10 years of service in judiciary (including the period of practice at the Bar) for being considered for appointment in question and in pursuance of the decision of the Standing Committee the willingness was called for and in all nine Judicial Officers had expressed their willingness for being considered for the post in question. The details of these nine Officers, as given out in the reply dated 10.1.2001 under Para 4.3. are as under:-

Sr. No.	Name of the Judicial Officer.	Designation and Station.
1.	Mr.A.R.Bhatt	Judge, City Civil Court, Ahmedabad (was retiring on 30.6.2000)
2.	Mr.P.B.Raval	Judge, City Civil Court, Ahmedabad (was retiring on 31.5.2000)
3.	Mr.B.S.Jaiswal	Judge, City Civil Court, Ahmedabad (was retiring on 31.3.2000).
4.	Mr.B.D.Ghasura	Joint District Judge, Bharuch (was retiring on 31.7.2000).

5. Mr.G.A.Ahuja Joint District Judge
(at the relevant time
was on deputation as
Member Secretary,
G.S.L.S.A. and had
applied for
re-patriation to
judiciary).

6. Mr.B.K.Rajpal Joint District Judge,
(was on deputation as
President, CDRF,
Ahmedabad (Rural).

7. Mr.N.R.Pathan Joint District Judge,
S.K. at Himatnagar
(was retiring on
30.4.2000).

8. Mr.V.C. Mandalia 2nd Joint District
Judge, Kheda at
Nadiad, (is to retire
on 31.10.2001) and his
name was recommended
for appointment as
Joint Charity
Commissioner.

9. Mr.N.A.Acharya Joint District Judge,
Vadodara.

The matter was then placed for consideration of the Standing Committee of the High Court of Gujarat in its meeting held on 30.3.2000 and the Office was directed to re-submit the matter alongwith the Recruitment rules prescribing eligibility criteria for appointment to the post of President, Industrial court. The matter then came up for consideration before the Standing Committee in its meeting held on 1.5.2000 alongwith the Draft Rules but the consideration of the subject mater was deferred and in the meantime the office was directed to re-submit the matter pointing out the provisions of law, particularly mentioning the provisions regarding eligibility, experience and age of superannuation etc. prescribed for the post in question. A detailed note was then submitted for consideration of the Standing Committee and after considering all the aspects in the meeting dated 29.6.2000, the Standing Committee decided that the name of Shri N.A.Acharya, Joint District Judge, Vadodara may be recommended to the Government in the

Labour and Employment Department for appointment as President, Industrial Court, Ahmedabad by nomination as provided under the Recruitment Rules for the post in question. Accordingly communication was sent to the Government on 5.7.2000 recommending the name of Shri N.A.Acharya for appointment on the post of Industrial Court, Ahmedabad. it has been stated in Para 6 of this reply that Shri Y.P.Bhatt, President (Incharge) of the Industrial Court at the relevant time had vide his letter dated 4.11.2000 expressed his unwillingness to be promoted as the President of the Industrial Court. In para 7 of the reply it has been stated that the decision to fill up the post of President, Industrial Court by way of nomination, as provided under the Rules, was arrived at after considering all aspects.

10. In Special Civil Application No.79/2001 Mr.Asim Pandya, Advocate, has entered appearing on behalf of Gujarat Public Service Commission. No return as such was filed by GPSC but Mr. Asim Pandya orally stated before us that the GPSC has not been consulted in this appointment at any stage and GPSC has nothing more to say.

11. We are, therefore, called upon to consider the legality, correctness and validity of the impugned Notification dated 7.12.2000 appointing respondent No.3 as the President of the Industrial Court at Ahmedabad in the light of the provisions of Bombay Industrial Relations Act, 1946, the Rules framed under proviso to Article 309 of the Constitution of India prescribing the Recruitment Rules for the post of Member, Industrial Court, Ahmedabad vide No.G.SH.122 ICE.1160/4863-T published in the Gujarat Government Gazette, February 25, 1965/PHALGUNA 6, 1886 dated 12.2.1965; the Draft Rules as framed by the High Court and the Recruitment Rules for the post of President, Industrial Court as contained at Item 34 in the Handbook of Guidelines on Recruitment Rules of Officers under Labour And Employment Department, Government of Gujarat, Gandhinagar, December, 1990 published for Office use only in the year 1992. It has to be agreed on all hands that the Industrial Court is a Court under Sec.3(16) of the Bombay Industrial Relations Act and is a Court of Industrial Arbitration constituted under Sec.10 of the said Act. Sec.10 of the Bombay Industrial Relations Act, 1946 is reproduced as under:-

"10. (1) The State Government shall constitute a Court of Industrial Arbitration.

(2) The Industrial Court shall consist of three or more members, one of whom shall be its President.

(3) Every member of the Industrial Court shall be a person who is not connected with the industrial dispute referred to such court or with any industry directly affected by such dispute :

Provided that no person shall be deemed to be connected with the industrial dispute or with the industry by reason only of the fact that he is a share-holder of an incorporated company which is connected with, or likely to be affected by such industrial dispute; but in such a case, he shall disclose to the State Government the nature and extent of the shares held by him in such company.

(4) Every member of the Industrial Court shall be a person who is or has been a Judge of a High Court or is eligible for being appointed a Judge of such Court or has Presided over a Labour court for not less than ten years.

Provided that one member may be a person not so eligible if in the opinion of the State Government he possesses expert knowledge of industrial matters;

Provided further that a member, who before his appointment as such member has presided over a Labour Court for not less than ten years shall notwithstanding anything contained in section 92, be eligible for appointment on a Bench of the Industrial Court consisting only of one member and section 92 shall have effect accordingly."

A reading of Sec.10, as above, would show that it provides for the constitution of the Industrial Court with three or more members, one of whom as its President and it also provides the eligibility for appointment as Member of the Industrial Court. While the eligibility has been prescribed under Sec.10 (3) & (4) for being a Member of the Industrial court, for the purpose of President of the Industrial Court all that has been said in sub-section (2) is that one of the Members shall be its President. Therefore, being a Member of the Industrial court is a pre-requisite and condition precedent for being the President of the Industrial court and no person can be appointed as the President of the Industrial Court unless he is a Member of the Industrial Court. Sec.123 of the Bombay Industrial Relations Act provides for the matters for which the Rule can be framed

to carry out the purposed of the Act. However, the matters at (a) to (z) and (aa) to (am) do not contain the matter with regard to the appointment of the President of the Industrial Court. Thus we do not have any set of Rules with regard to the appointment on the post of President of the Industrial Court under the Bombay Industrial Relations Act, 1946. So far as the Rules, which were published in the Gujarat Government Gazette dated 25.2.1965 under proviso to Article 309 of the Constitution of India are concerned, we find that these Recruitment Rules are also only for the post of Member, Industrial Court and for the rules as published in the Hand Book (1992) the stand of the High Court is that even these rules were not framed in consultation with the High Court. The High Court has kept in view the Draft Rules prepared for recruitment to the post of President of the Industrial Court. The text of these Draft rules, as has been relied upon by the High Court while making appointment in question, is reproduced as under:-

"DRAFT RULES

1. These rules may be called the Recruitment Rules for the post of President, Industrial court, Gujarat, 1998.

2. The appointment of President, Industrial Court, Gujarat, shall be made by the Governor of Gujarat, in consultation with the Public Service Commission and the High Court, either-

(a) by promotion from amongst the Members, Industrial Court on the basis of seniority cum merits provided that a person shall not be eligible to be promoted to the post of President, Industrial Court, unless he has completed five years service on the post of Member, Industrial Court, or

(b) by nomination.

3. To be eligible for appointment by nomination, mentioned in rule 2(b), a candidate must not be connected with any industry as defined in the Bombay Industrial Relations Act, 1946 and must -

(i) not be less than 45 years of age,
and

(ii) have for at least 10 years either held a judicial post in India or been an Advocate for High Court or have expert knowledge of Industrial matters.

4. A person appointed by direct recruitment shall

normally be on probation for a period of one year and shall have to pass an Examination in Hindi and/or Gujarati, according to the Rules prescribed by the Government."

In fact this set of Rules is proposed Draft of Rules. Even according to these Recruitment Rules, the appointment of President, Industrial Court, Gujarat is required to be made by Governor of Gujarat in consultation with the Public Service Commission and the High Court by promotion from amongst the members of Industrial Court on the basis of seniority come merit and it has been provided that a person shall not be eligible to be promoted to the post of President, Industrial Court unless he has completed 5 years of service on the post of Member, Industrial Court. The High Court while giving the details of 14 Members of the Industrial Court has found that none of these 14 Members of the Industrial Court had completed 5 years of service and, therefore, they have not been considered to be eligible for appointment on the post of President, Industrial Court by promotion and accordingly they have not been considered while making the appointment in question. The other mode of Recruitment, as has been provided in the Draft Rule 2(b) is by nomination and according to Rule 3 of the Draft Rules, the eligibility for appointment by nomination is not less than 45 years of age and at least 10 years of holding of a judicial post in India or being an Advocate for High Court or having expert knowledge of Industrial matters and that the candidate must not be connected with any industry as defined in the Bombay Industrial Relations Act. As per the details with regard to the candidature of respondent No.3 Shri N.A.Acharya his date of birth is 30.11.1948, he has been found to be a candidate not below the age of 45 years and on the basis that he had practiced as an Advocate from 30.10.74 to 21.7.78 and served as Civil Judge (J.D.) & J.M.F.C. from 1.8.78 to 30.11.83 and again practiced as an Advocate from 1.12.83 to 22.12.99 and that he was Joint District Judge since 23.12.99, it has been found that his total period of judicial service is 6 years and total period of practice as an Advocate is 20 years. He was considered to be eligible for appointment to the post of President, Industrial Court through the mode of nomination. Respondent No.3 was thus one of the 9 candidates, who had expressed their willingness for being considered for the post in question. It appears that out of these 9 candidates, 5 candidates named at Nos.1,2,3,4 and 7 were retiring at the end of June, May, March, July and April, 2000 respectively. The candidate at No.5 was on deputation as Member Secretary, Gujarat State Legal

Services authority and had applied for his repatriation to judiciary, candidate at No.6 was on deputation as President, CDRF, Ahmedabad (Rural), candidate at No.8 was recommended for appointment as Joint Charity Commissioner and, therefore, the choice fell upon respondent No.3, who was at No.9 amongst these 9 Officers, who had expressed their willingness and accordingly his name was recommended for appointment as President of the Industrial Court.

12. In the given fact situation, in absence of any Rules with regard to the appointment on the post of President of Industrial Court except the existing Draft Rules framed by the High Court and the rules as had been framed under proviso to Article 309 vide Gujarat Government Gazette dated 25.2.1965 being only for recruitment for the post of Member, Industrial Court, and the Rules for appointment of the President, Industrial Court as contained in the Hand Book (1992), that too not in consultation with the High Court, the only relevant provision which can be traced is Sec.10 of the Bombay Industrial Relations ACt,1946 and according to Sec.10(2) one of the Members of the Industrial Court has to be the President. According to Gujarat Civil Services (Revision of Pay) Rules, 1998, the pay scale of the President, Industrial Court, Gujarat is Rs.16000-20050 and that of the Member, Industrial Court, Gujarat is Rs.14300-18300. The pay scale of the Principal Judge and Addl. Principal Judge of the City Civil Court at Ahmedabad is Rs.18400-22400 and that of Judge of the City Civil Court is Rs.18300- - Fixed while the pay scale of the District and Sessions Judge/Joint District Judge and Addl. Sessions Judge is Rs.14300-18300 and that of the Assistant Judge and Assistant Sessions Judge/Assistant Judge and Addl.Sessions Judge/ Extra Assistant Judge is Rs.10000-15200. It, therefore, appears that the pay scale for the post of President, Industrial Court is higher than that of Member, Industrial court and is also higher than the pay scale prescribed for the post of District and Sessions Judge/Joint District Judge and Addl. Sessions Judge. The higher pay scale prescribed for the post of President, Industrial Court read with provisions of Sec.10(2) of the Bombay Industrial Relations Act clearly indicate that when a Member is appointed as a President of the Industrial Court, his appointment as such is to a post carrying higher pay scale. Bombay Industrial Relations Act does not contemplate the appointment by direct recruitment. It only says that one of the Members has to be its President. Naturally it is borne out that only the members of the Industrial Court form the zone of

consideration for appointment to the post of President, Industrial Court. There is nothing in the Act so as to prescribe certain period of service as Member and in this view of the matter, no person holding the post of Member, Industrial court could be kept out of consideration by saying that he had not completed 5 years of service as per the Draft Rules prepared by the High Court. Even if any set of Rules are made such Rules have to be consistent to the Act and the eligibility for appointment on the post of President of Industrial Court, as contemplated by the Act, cannot be truncated by any set of rules, much less the proposed Draft rules prepared by the High Court. We, therefore, find that there was no lawful justification for excluding the candidates, who were holding the post of Member, Industrial Court and whereas they have been kept out of consideration on the basis of the proposed Draft rules, the consideration for making the appointment to the post in question stands vitiated. In the first instance, there is no question of appointment by nomination on the basis of the proposed Draft Rules by holding that existing Members were not eligible because they have not completed 5 years as Member. In a given case when the only mode of appointment is promotion and it is found that no one is eligible for appointment by promotion, it may be open to make appointment by direct recruitment, which would mean inviting application from all eligible candidates and then making the selection. No such procedure has been followed and the consideration was kept confined to the Members of the Judicial Services, who had conveyed their willingness for appointment as President of the Industrial Court. We find that the procedure, which has been adopted and which has led to the impugned appointment, is not in conformity either with the general right of equality under Article 14 of the Constitution of India and with the right of equality in matters relating to employment as contemplated by Article 16 of the Constitution of India and, therefore, this appointment cannot be sustained in the eye of law.

13. Considering even on the basis of the proposed Draft Rules it is clear by reading of Rule 2 of these Draft rules that the appointment of the President, Industrial Court has to be made by the Governor of Gujarat in consultation with the GPSC and the High Court and on behalf of the Public Service Commission, it has been stated before us in no uncertain terms that it was not consulted at any stage. Thus, even the Draft Rules have not been followed. We further find that in these very Draft Rules, "Nomination" has been provided as the alternative mode of appointment and in rule 4 the term

"direct recruitment" has been used. Strictly speaking, we find that the very term "Nomination" as a mode of appointment is a misnomer and militates against the requirements of Articles 14 and 16 of the constitution of India. If at all it is said that what is meant by "nomination" is direct recruitment, such mode must be mentioned in the rules as direct recruitment rather than "Nomination" because in our opinion, nomination is not the correct term according to the basic tenets of the service jurisprudence. The term "Nomination" suggest that any person who is eligible may be picked up for appointment without simultaneously considering the competing claim of the other eligible candidates as has been exactly done in the instant case. It is established in the facts of the present case that the competing claims of other eligible candidates including the existing Members of the Industrial Court had not been considered. If eligibility was denied to them on the ground of lack of 5 years service as member for the purpose of promotion, their candidature could certainly be taken into consideration through the alternative mode, but we find that all the existing Members have been elbowed out altogether even for the purpose of consideration for appointment to the post in question through the alternative mode of nomination. We fail to understand how it was taken for granted that the existing 14 Members of the Industrial Court did not possess the eligibility for appointment through the alternative mode because their eligibility could not be tested unless the Applications are invited and they had come out with the details of their candidature for appointment by nomination even with reference to the Draft Rules.

14. It is also not in dispute that the respondent No.3 had never been appointed as Member of the Industrial Court and in terms of Sec.10(2) of the Bombay Industrial Relations Act, without being a Member of the Industrial Court, there is no question of his appointment as the President of the Industrial court either by promotion or by direct recruitment. Being a Member of the Industrial court is a sine qua non for consideration for the post of President of the Industrial Court and no person who is not a Member of Industrial Court could be considered for appointment as such without committing violence to the requirements of Sec.10(2).

15. Faced with this situation, Mr. S.N.Shelat submitted that once a person is appointed as the President of the Industrial Court, he automatically becomes a Member and, therefore, the appointment of respondent No.3 as the President of the Industrial Court

is inherent in his appointment as President of the Industrial Court. This submission on the face of it is not tenable because the scheme of Sec.10 of the Bombay Industrial Relations Act contemplates appointment as Member and one of such Members has to be its President. Therefore, we find that even if respondent No.3 had the eligibility to be appointed as Member, in fact he was not appointed as a Member of the Industrial Court at any time and, therefore, he could not be considered for appointment to the post of President, Industrial Court. The impugned order was also sought to be defended by arguing that in absence of the Rules, executive instructions can be pressed into service and, therefore, proposed Draft Rules, as had been prepared, could be taken as the executive instructions. There cannot be any quarrel with the legal proposition that in absence of Rules, executive instructions may be used but such executive instructions also cannot be inconsistent to the Act. In the instant case, we find that the mode of direct recruitment is not contemplated and even if any direct recruitment is held for the post of President of Industrial court when no Member is eligible, such direct recruitment is required to be held after affording equal opportunity to all those, who are eligible. The proposed Draft Rules 2(a) seeks to render the Members of the Industrial Court to be ineligible by putting the condition of the completion of 5 years service on the post of Member. When the Act has not put any such fetter and the Act contemplates that one of the Members of the Industrial Court shall be the President and it is not stated that he must complete certain years of service as Member, through executive instructions such a requirement could not be pressed so as to defeat the right of consideration of the Members of the Industrial Court for consideration to the post of the President. Under Sec.10(2) every Member of the Industrial Court is eligible to be considered for the post of President notwithstanding the number of years of service put in by him as a Member.

16. In our considered opinion, Sec.10 of the Bombay Industrial Relations Act, 1946 is the only relevant provision to be taken note of for the purpose of appointment of the President and the only mode of appointment is by way of promotion from amongst the Members of the Industrial Court and in this regard, if any Rules are to be framed in exercise of the powers under Chapter VI of Part VI of the Constitution of India, the same cannot be inconsistent with the requirements of the Bombay Industrial Relations Act, 1946. The Industrial Court itself is the creation of this special

enactment. Any Rules for recruitment to the post of President of such Court has to be consistent with the provisions of this Act, Articles 14 and 16 of the Constitution of India and in accordance with the constitutional provisions under Chapter VI of Part VI of the Constitution of India. Whereas we find that the appointment of the respondent No.3 as President of the Industrial Court is contrary to the provisions of Sec.10(2) of the Bombay Industrial Relations Act and is not based on the simultaneous consideration of the competing claims of all eligible candidates and the consideration has been kept confined to the Judicial Officers working in the cadre of City Civil Court Judges and District Judges only to the exclusion of all other eligible candidates, including the Members of the Industrial Court, the appointment of respondent No.3 offends Articles 14 and 16 of the Constitution of India and hence cannot be sustained in the eye of law. We, therefore, do not find it necessary to go into the other submissions, which were urged before us and the various cases, which were cited before us.

17. In the Division Bench order dated 16.1.2001, by which the matter was referred to larger Bench, the reference was made to the case of Prantiya Kamdar Sena and another v. State of Gujarat and another, reported in 1998(2) GLH 970 in para 11 thereof, in which the view was taken that in relation to service matters only the persons aggrieved must come forward. Others in the presence of such petitioners must not take up their cause and seek remedies. Reference was also made to the case of S.P.Gupta and others v. President of India and others, reported in AIR 1982 SC 149 and the case of Sub committee on Judicial Accountability v. Union of India and others, reported in (1991) 4 SCC 699 on the question of locus standi. This controversy, in our opinion, may not detain us because the law is settled that so far as the writ of quo-warranto is concerned, relator may not have a direct interest so as to challenge usurpation of a public office. Besides it by the time the matters came up before the Division Bench, the Members of the Industrial Court themselves had already filed the petition (Special Civil Application No.79/2001) and they were directly aggrieved and the petitioners in Special Civil Application No.12665/2000 i.e. Gujarat Kishan Mazdoor Panchayat, which is a Trade Union Registered under the Trade Unions Act, and the petitioner in case of Special Civil Application No.80/2001 i.e.Labour Laws Practitioners Association and petitioner in case of Special Civil Application No.93/2001 i.e. Surat Textile Labour Union could not be said to be totally unconcerned

relators or simply busy bodies for the purpose of filing a writ of quo-warranto. None of these petitions could be thrown away on the question of locus standi. As a matter of fact once Special Civil Application No.79/2001 had been filed by the Members of the Industrial Court, the objection of locus standi had virtually lost importance and the petitioners in other three petitions could also seek a writ of quo-warranto in the matter of usurpation of the public office and we find that the Division Bench decision in the case of Prantiya Kamdar Sena and another v. State of Gujarat and another (Supra) could not come in the way of maintaining the three petitions, which had been filed by the respective petitioners in Special Civil Application No.12665/2000 and Special Civil Application No.80/2001 and Special Civil Application No.93/2001. The petitioners in Special Civil Application No.79/2001 were directly aggrieved persons and they could certainly maintain the petition.

18. Upshot of the discussion, as aforesaid, is that the order of the appointment of the respondent No.3 Shri N.A.Acharya as the President of the Industrial Court made vide Notification dated 7.12.2000 issued by the order of Governor by the Labour and Employment Department of the Government of Gujarat under the signatures of the Deputy Secretary to the Government in Labour and Employment Department, which is impugned in these Petitions cannot be sustained in the eye of law and the same is hereby quashed and set aside. The respondents, other than respondent No.3, may proceed to make the appointment afresh on the post of the President of the Industrial Court, Gujarat in the light of what has been held in this order and in accordance with law. All these four Special Civil Applications are allowed as indicated above and the rule is made absolute in each of these four Special Civil Applications. No order as to costs.

(M.R.Calla,J)

(Y.B.Bhatt,J)

(K.R.Vyas,J)